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No. 89-155

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

MONTANA HORNER,

Petitioner,

v.

UNITED STATES PAROLE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

The Government's attempt to shift the focus of the serious questions presented for review[1] fails to address the interference of the Sixth Amendment and statutory right to counsel during a federal criminal case (after plea and before sentence) during a parole

[1] The rephrasing and the reordering of the Questions Presented (Govt. Opp. (I)) dilutes the denial of counsel at the parole revocation hearing and the failure to afford even fundamental due process as well as statutory compliance with notifying the confined parolee of what adverse information would be used against him. When Congress directs a federal agency, the Parole Commission, to grant rights to prisoners, under our Constitution the federal courts must "check" the overreaching of the Executive Agency.

revocation proceeding in a federal prison. This Court enforces the right to counsel prior to charge (**Edwards v. Arizona**, 451 U.S. 477 (1981)) and after the charge (**Massiah v. United States**, 377 U.S. 201 (1964), yet the Government fails to evaluate the central question recognized by the Court of Appeal: Was the acknowledged defective waiver of counsel attenuated?[2]

Today there are approximately 56,000 federal prisoners, and a fair estimate would indicate more than half would be subject to "old law" sentences with included parole terms.[3] The projected demise of the Parole Commission is premature and offset by "Ex post

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[2] The Government repeats the factually unsupported conclusion of the Court of Appeals (Opp. 13) without statement or analysis of the precedent of this Court, i.e., **Wong Sun v. United States**, 371 U.S. 471, 491 (1963) et al. (Pet. 19-20).

[3] Although the "new law" (Sentence Reform Act of 1984) sentences were to be effective 1 November 1987, over half of the federal district judges had found them unconstitutional. On 18 January 1989, this court rejected several attacks on the constitutionality of the "new law" sentences (**Mistretta v. United States**, 109 S.Ct. 647), but up to then many "old law" sentences were imposed and are still intact.

Facto" concerns and a burgeoning prison population, which may require Congressional reconsideration of parole for "new" and "old law" sentences. The real constitutional issue is whether the Sixth Amendment right and access to counsel withers in a prison and may be undermined by a fraudulent and coerced waiver.

STATEMENT OF THE CASE

The Government contends that the request for an evidentiary hearing was not raised in the Court of Appeals (Opp. 14). Wrong. Petitioner in the Brief for Appellant in the Court of Appeals ("The Supreme Court required that a hearing be held on these allegations...." 24-25) and expressly cited and relied on **Machibroda v. United States**, 368 U.S. 487 (1962)(hearing required on voluntariness of plea even with affidavit of prosecutor denying petitioner's allegations of coercion). In the Petition for Rehearing (page 14) filed in the

Court of Appeals the petitioner "requests the judgment be modified to direct an evidentiary hearing on Reasons A and B [Questions Presented No. 1 and 2]." The denial of a hearing was clearly before the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

A. THE COERCED AND FRAUDULENTLY PROCURED WAIVER OF COUNSEL BY THE CASE MANAGER THE DAY BEFORE AND THE DAY OF THE PAROLE HEARING FROM THE CONFINED INCOMMUNICADO PAROLEE WAS NOT DISSIPATED BY THE PAROLEE'S RESTATEMENT OF THE WAIVER BEFORE THE PAROLE COMMISSION.[4]

The Government contends "Moreover, the record does not suggest (and petitioner does not argue) that any statement he (petitioner) made before the examiners was coerced or involuntary." (Opp. 13). That claim is error. Petitioner's contention, supported by the record and the appellate finding of the case manager's misconduct, was that the counsel waiver of the petitioner before the parole

[4] This section corresponds to Argument 2 (pp. 11-14) in the Opposition.

examiners was the direct product of the coercion and programming of the case manager. The situation was analogous to **Machibroda, supra,**[5] in which the judge took an apparently voluntary plea of guilty three days after the defendant had allegedly made a deal with the prosecutor that he would receive no more than 20 years. The prosecutor had told the defendant not to mention the deal to his attorney. The district court imposed a 40-year sentence and denied an evidentiary hearing on the post-conviction petition challenging the voluntariness of his plea (waiver). This Court directed that given the specific factual allegations an evidentiary hearing was required.

The conduct of the case manager is far more egregious than that of the prosecutor in **Machibroda.** He usurped the role of the

[5] Although **Machibroda** was discussed and relied upon in the Petition (15), it was not mentioned in the Opposition.

attorney and threatened petitioner with adverse consequences: continuation in lock-up, additional time if represented by an attorney, and substandard representation by Mexican attorney if counsel was demanded, and lied about his contact with Attorney Sevilla, who had emphasized that petitioner should not waive counsel. Like the prosecutor, he promised a good deal: release in 24-36 months. On the charge specified in the notice of revocation this was a fair estimate, and the petitioner relied on these representations of the case manager when he waived his attorney before the examiners. The case manager substitution as attorney was complete when he advised the petitioner to be completely open and candid because his honesty could only help him, a waiver of his Fifth Amendment privilege which had disastrous consequences for him.[6]

[6] The Government suggests that the petitioner should be penalized for not bearing his soul to the case manager of possible charges not related to those that served as the basis for

The Government argues that the petitioner signed three separate waivers of counsel (Opp. 14), but the Court of Appeals recognized that they were the product of inappropriate and erroneous advice. (Pet. App. 6474-6475).

Given the admitted facts, which includes the possibility the case manager was present at the parole hearing,[7] the continuous influence of the case manager corrupted the waiver before the parole examiners. Without an evidentiary hearing it cannot be found that

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revocation ((1) San Diego offense [April 1982], (2) failure to report change of residence, and (3) failure to submit monthly supervision reports (ER 118-119). (Opp. 13 n.6). The case manager who had access to the records on the petitioner before the hearing was able to formulate an opinion of the probable parole release date. If the opinion was given without limitation or inquiry of the petitioner, the petitioner acted reasonably in relying on it. The petitioner was never apprised, especially in the incommunicado status and without access to a lawyer seeking his interest, that extrinsic evidence would be considered. The parole examiners did in fact rely on extrinsic information, and the case manager, if he had access to that information, was making even more serious misrepresentations to get the petitioner to waive counsel. The protracted speculation by both the Government and the Court of Appeals demonstrates in this fact specific case there should have been an evidentiary hearing.

[7] Although not in the record, it is normal procedure for the case manager to be present at parole revocation proceedings.

the admitted "primary taint" was purged. **Taylor v. Alabama**, 457 U.S. 687, 690 (1982).

B. PETITIONER, A PAROLEE, WAS DENIED REASONABLE ACCESS TO ADVERSE INFORMATION BEFORE PAROLE HEARING IN VIOLATION OF 18 U.S.C. 4208(b) AND U.S. DEPARTMENT OF JUSTICE V. JULIAN, 108 S.CT. 1606 (1988).[8]

The statute (18 U.S.C. 4208(b)) states that "[a]t least thirty days prior to any parole determination proceeding, the prisoner shall be provided with ... (2) reasonable access to a report or other document to be used by the Commission in making its determination." Congress placed the duty to disclose on the Parole Commission. **U.S. Department of Justice v. Julian**, 108 S.Ct. 1606, 1612 (1988), but the Government contends that the regulation requiring a request (Opp. 16) (it is not known from the record whether one was made) precludes the invocation of this statutory right in the

[8] This section corresponds to Argument 3 (pp. 15-17) in the Opposition.

context of this case where the prisoner was unexpectedly removed from a local detention facility (San Diego MCC) to a distant penitentiary (Lompoc, California) four days before the hearing. The surprise hearing was aggravated by the surprise evidence, which controverted both letter and spirit of the statute.

The parole examiners certainly considered the nondisclosed adverse information in the questioning of the petitioner's non-charged misconduct. Petitioner's admissions confirmed the non-disclosed misconduct for which the prisoner did not have an opportunity to prepare himself.

The Government contends the defective notice of the non-disclosed information at the July 1985 parole revocation hearing was cured by the December 1985 special reconsideration hearing. (Opp. 16-17). The Parole Commission ordered the reconsideration hearing solely to determine the impact of the sentence imposed

by the San Diego federal court after the July 1985 parole revocation hearing. The December 1985 examiners relied upon the same information and determination made in July 1985. This did not cure the error. It reiterated the mistakes of the earlier hearing. The petitioner was entitled to access the adverse information at the time it would have been useful to him.

C. THE SPECIAL TERM REMOVAL UNDER BIFULCO WAS NOT A "CASE SPECIFIC FACTOR" THAT EXCUSED REQUIRED EARLY TERMINATION OF PAROLE.[9]

The Government contends that the original sentencing judge intended an illegal sentence. Under **Bifulco** the judge was not authorized by statute to impose a term of special parole on a conspiracy. In this case the judge imposed a special term only one year above the minimum required for substantive offenses.

The Parole Commission was bound by its

[9] This section corresponds to Argument 1 (p. 10) in the Opposition.

regulations,[10] which implemented a statutory (18 U.S.C. 4211(b)) policy of early termination of parole supervision. Research had established that most violations occur in the first two years on parole. 46 Fed. Reg. 28648-9 (28 May 81).

The Commission circumscribed its discretion and defined "case specific factors" relating to the parolee's current behavior or background. (28 C.F.R. 2.43(e)(2); Opp 7 n.4). The invalidation of the special parole term was not within the consideration of the parole regulation, and it was mentioned by the probation/parole officer, but not relied upon by the Commission in its extension of his parole beyond the three-year regulatory limit (April 1981). When the parole violation was charged in 1982, four years after release on parole, the Commission no longer had jurisdic-

[10] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954).

tion. It is not appropriate to construct jurisdiction through appellate hindsight.

CONCLUSION

For the reasons set forth in the Petition and this Reply, this Court should grant a writ of certiorari to review the judgment of the court of appeals denying the evidentiary hearing and the writ of habeas corpus.

Respectfully submitted,

2 November 1989

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